STATE OF MICHIGAN

COURT OF APPEALS

THOMAS M. GEORGE,

Plaintiff-Appellant,

v

SENATE DEMOCRATIC FUND, ED LAFORGE FOR STATE SENATE, and ED LAFORGE,

Defendants-Appellees,

and

WZZM TV-13, WXMI TV-17, WOTV TV-41, WWMT TV-3, and WOOD TV8,

Defendants.

UNPUBLISHED
May 3, 2005

No. 253202
Kalamazoo Circuit Court
LC No. 02-000614-CZ

THOMAS M. GEORGE,

Plaintiff-Appellee,

v

SENATE DEMOCRATIC FUND, ED LAFORGE FOR STATE SENATE, and ED LAFORGE,

Defendants-Appellants,

and

WZZM TV-13, WXMI TV-17, WOTV TV-41, WWMT TV-3, and WOOD TV8,

No. 254158
Kalamazoo Circuit Court
LC No. 02-000614-CZ

Defendants.

Before: Sawyer, P.J., and White, and Talbot, JJ.

PER CURIAM.

In Docket No. 253202, plaintiff appeals as of right the circuit court's orders dismissing his defamation claim and assessing sanctions of $21,154.61 against him and his attorney. In Docket No. 254158, defendants appeal the amount of the sanctions awarded. The appeals were consolidated. We affirm the grant of summary disposition and reverse the grant of sanctions.

I

Plaintiff brought this action based on a television ad that aired on the eve of a state senate election between plaintiff and the individual defendant. The advertisement ran on five local television stations in Kalamazoo from Friday, November 1, 2002, through the election on Tuesday, November 5. The thirty-second ad begins with an image of Douglas and Vicki Kuehl and their sons, nine-year-old Taylor and five-year-old Slater, in their living room. The bottom of the screen reads, "Paid for by Democratic funds with regulated funds authorized by Ed LaForge for State Senate." A visual overlay reading "Tom George won't accept Blue Cross" appears midway through the ad. A woman's voice narrated the following:

> Vicki and Doug Kuehl thought insurance would cover treatment for their youngest son, Slater's brain tumor, but Tom George's medical clinic wouldn't accept Blue Cross. The Kuehls had to pay out of pocket or find new doctors. Now they face bankruptcy. All because they wanted the best for Slater.

Mrs. Kuehl says, "I don't understand why Tom George wouldn't want our family to be provided for." The narrator's voice ends the advertisement with the comment, "If Tom George wouldn't help Slater, how can we count on him in the State Senate."

It is undisputed that plaintiff, an anesthesiologist, is a shareholder in a medical group that does not accept Blue Cross, that Slater received anesthesiology services from the medical group, but not from plaintiff, that the Kuehls thought their insurance would cover the services, but were informed that the group would not accept Blue Cross, and that they therefore incurred considerable charges, and that plaintiff never treated Slater and never refused treatment to Slater.

Plaintiff responded to the advertisement by having his campaign aide call the LaForge campaign office and demand that the advertisement be pulled within fifteen minutes, issuing press releases denouncing the advertisement, holding a press conference, and running an advertisement defending himself and attacking LaForge in the *Kalamazoo Gazette* on Sunday, November 3, 2002. Plaintiff filed this action the day before the election. Notwithstanding the advertisement, plaintiff won the election

The circuit court granted defendants' motion for summary disposition concluding that the statements were literally true, and that if not completely accurate, the errors were insignificant and did not affect the gist or sting of the advertisement.

II

Assuming arguendo that the circuit court erred in determining as a matter of law that the gist or sting of the advertisement was not defamatory, and in not submitting that issue to the jury, we conclude, nevertheless, that plaintiff's admitted lack of damages precludes his action. Plaintiff conceded that he sustained no actual monetary loss or mental or emotional distress, though he did claim general irritation and concern for his reputation as a physician.[1]

Plaintiff asserts that notwithstanding the absence of actual damages, he is entitled to maintain this action because it involves "defamation per se," the offending statements having concerned plaintiff's profession or employment. We disagree. MCL 600.2911(1) specifically mentions and makes "actionable" two specific types of common law defamation per se: "[w]ords imputing a lack of chastity" and "words imputing the commission of a criminal offense." Defamation regarding one's business or profession is not made specifically actionable, and is therefore governed by the remainder of MCL 600.2911. MCL 600.2911(2)(a) and (b) limit recovery to actual damages, unless the plaintiff gives notice to publish a retraction and allows a reasonable amount of time to do so. Here, plaintiff did not request a retraction, but rather, that the advertisement be pulled. Additionally, plaintiff's demand was not directed to the Senate Democratic Fund, or to LaForge directly, but to his campaign office. Further, plaintiff demanded that defendant take action within fifteen minutes, which is not a reasonable time, as required by the statute.

In *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 729-730; 613 NW2d 378 (2000), this Court ruled that the damages restrictions found elsewhere in the statute did not apply to the two types of defamation per se mentioned in subsection (1). The plaintiffs were accused of the crime of not paying a bill at a restaurant. *Id.*, 725. The Court reversed the circuit court's grant of summary disposition to defendant. *Id.*, 730. In so doing, it ruled that under the

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[1] We reject plaintiff's argument that the issue is not properly before us because defendants failed to file a cross-appeal. The issue was raised in defendants' motion for summary disposition and was addressed by the circuit court. The court concluded that "presumed damages" based on defamation per se are a form of punitive or exemplary damages, which are only available under MCL 600.2911(2)(a) where the plaintiff has demanded a retraction and allowed a reasonable time for the retraction. The court went on to observe that the Court of Appeals ruled otherwise in *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 730; 613 NW2d 378 (2000), and *Glazer v Lamkin*, 201 Mich App 432, 434-437; 506 NW2d 570 (1993). The circuit court further stated, however, that there would be constitutional problems with allowing nominal or presumed damages where political speech involving a political candidate is involved. The circuit court ultimately declined rule on the issue, however, because it was dismissing the case anyway. Under the circumstances that the circuit court did not enter a clear ruling adverse to defendants on this issue, a cross-appeal was not necessary, and defendants properly argued this issue as an alternative basis, argued to the circuit court, upon which to support the circuit court's decision.

principles of statutory construction, the statute must be read to mean that the Legislature did not intend the actual damages and actual malice restrictions of later sections to negate the import of the specific mention of the two per se actions in subsection (1). *Id.*, 729. The circuit court in the instant case questioned the wisdom of the decision, but it read *Burden* too broadly. That case stressed the specific mention of actions for words imputing chastity or criminality. Here, plaintiff's cause of action falls under neither category.

The damage restrictions of MCL 600.2911 are fatal to plaintiff's case. Plaintiff is limited to actual damages because he did not demand a retraction as required under MCL 600.2911(2)(b). Instead, his agent demanded that transmission cease within fifteen minutes, which is different. Because plaintiff suffered no actual damages, his action was properly dismissed.

III

We conclude, however, that the court erred in imposing sanctions on plaintiff and his attorney for filing this action in violation of MCR 2.114(D)(2). The court concluded:

> Modest research by plaintiff's counsel would have quickly revealed the lack of legal support for his position. Our Supreme Court's opinion [sic] in *Chmura I*[2] *and II*[3] are veritable treatises on the law of defamation in cases involving candidates for elective office. Reading them would have told plaintiff's counsel that plaintiff could not prevail in this case. . . . Or, reading just a few of the numerous landmark decisions addressing the issue presented by this case would have readily confirmed that this case could not possibly succeed. [Footnotes added.]

The court concluded that the action was not warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, and imposed sanctions under MCR 2.114(D)(2) and (E).

Plaintiff's claim rests on the legal and factual premises that Michigan recognizes defamation by implication, relying on *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315; 583 NW2d 725 (1998), that the advertisement's implication that plaintiff refused to help Slater is false, that defendants were aware of this falsehood and acted with malice, that the *Chmura* cases focus on the falsehood of the gist of the statement,[4] and that plaintiff suffered adequate damages because the case involves defamation per se, he suffered irritation and concern for his professional reputation, and he requested that the advertisement be pulled. None of these positions lacked factual support or were unwarranted by existing law or a good-faith argument

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[2] *In re Chmura*, 461 Mich 517; 608 NW2d 31 (2000) *(Chmura I).*

[3] *In re Chmura (After Remand)* 464 Mich 58; 626 NW2d 876 (2001) *(Chmura II).*

[4] We note that the *Chmura* cases involved a charge of judicial misconduct case, not a claim of defamation.

for the extension, modification or reversal of existing law.[5] The court erred in concluding that plaintiff and his lawyer violated MCR 2.114(D)(2).

We affirm the court's grant of summary disposition and reverse the grant of sanctions.

/s/ David H. Sawyer
/s/ Michael J. Talbot

[5] In light of our conclusion that plaintiff did not violate MCR 2.114(D)(2), we need not reach defendants' claim that the court erred in not awarding greater sanctions under MCR 2.114(E).